

1

2

3

4

5

6

7

The Honorable Benjamin H. Settle

8

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT TACOMA**

9

TODD BRINKMEYER,

NO: 3:20-cv-05661-BHS

10

Petitioner,

DECLARATION OF  
REBECCA SMITH IN SUPPORT OF  
THE BOARD'S MOTION FOR  
SUMMARY JUDGMENT

11

v.

12

WASHINGTON STATE LIQUOR AND  
CANNABIS BOARD,

13

Respondent.

14

15

I, REBECCA SMITH make the following Declaration of my own personal knowledge under penalty of perjury under the laws of the United States and the state of Washington that the foregoing is true and correct. I am over the age of 18 and competent to testify to the matters stated here:

20

1. In 2012, I-502, an initiative for the legalization of recreational marijuana in the state of Washington, was approved by a popular vote. I was initially the Marijuana Licensing Manager, and then shortly thereafter became the Director of Licensing with the Washington State Liquor and Cannabis Board (Board) when I-502 was being implemented. As Licensing Director, I oversee and work with hundreds of Board employees, including Licensing Specialists, Enforcement Officers, and their leadership, all to ensure that the Washington marijuana industry runs smoothly and in accord with the intent of the law. In my nine years working at the top level

21

22

23

24

25

26

DECLARATION OF REBECCA SMITH  
IN SUPPORT OF THE BOARD'S  
MOTION FOR SUMMARY JUDGMENT  
NO: 3:20-cv-05661-BHS

1

ATTORNEY GENERAL OF WASHINGTON  
1125 Washington Street SE  
PO Box 40100  
Olympia, WA 98504-0100  
(360) 664-9006

1 of this new and evolving industry, I am intimately familiar with marijuana statutes and rules, and  
 2 the underlying policies that support those laws.

3       2. In voting for I-502, the people of Washington approved a residency requirement  
 4 for licensees. Wash. Rev. Code § 69.50.331(1)(b) (2013). As Washington was one of the first  
 5 two states (the other being Colorado) to legalize the marijuana industry, it was of paramount  
 6 importance to meet the Initiative's goal of having a "tightly-regulated" industry and to ensure  
 7 that marijuana remained within Washington's borders. The Board promulgated rules that clarify  
 8 the residency requirement applies to all applicants applying for a marijuana license, including  
 9 all true parties of interest. *See* Wash. Admin. Code § 314-55-020(11) (2021) and Wash. Admin.  
 10 Code § 314-55-035(1) (2020). These rules and statute are collectively referred to as the  
 11 "Residency Requirements."

12       3. In 2015, Washington merged its recreational and medical marijuana markets and  
 13 expanded the number of retail licenses available. The Legislature mandated that the Board  
 14 prioritize the applicants, giving priority to those applicants who had experience in Washington's  
 15 collective garden system.<sup>1</sup> Washington's collective garden system allowed qualifying patients  
 16 to produce, process, transport and deliver cannabis for medical use. One reason for prioritizing  
 17 those who had Washington collective garden experience was to ensure that Washington's  
 18 medical marijuana patients would continue to receive the products and assistance they needed  
 19 as the markets merged.

20       4. Additionally, in 2020, Washington adopted a Social Equity Program for cannabis  
 21 licenses. The Legislature passed E2SHB 2870, a bill meant to provide business opportunities to  
 22 people disproportionately impacted by the enforcement of marijuana prohibition laws by  
 23 providing them with the opportunity to apply for marijuana retail licenses. It recognizes that

---

24       <sup>1</sup> Former Revised Code of Wash. §69.50.331 (2015) gave first priority to those applicants who had applied for a  
 25 marijuana license in 2014, who owned or were employed by a collective garden before January 1, 2013, maintained  
 26 relevant business licenses and paid all applicable state taxes and fees. Second priority was given to those who owned  
 or were employed by a collective garden before January 1, 2013, maintained relevant business licenses and paid all  
 applicable state taxes and fees. And third priority was given to all other candidates.

1 these laws were disproportionately enforced for decades and that the cumulative harms from this  
 2 enforcement remain.

3       5. I am aware that Todd Brinkmeyer, an Idaho resident, has challenged  
 4 Washington's Residency Requirements. Per the Petition filed in this case, Brinkmeyer would  
 5 like to receive an ownership interest in Michael "Scott" Atkison's cannabis retail licenses.  
 6 Neither Brinkmeyer nor Atkison have submitted an application to add Brinkmeyer as a true party  
 7 of interest on any of the five marijuana licenses that Atkinson currently holds an interest in.

8       6. Of the five marijuana retailer licenses that Atkison holds an interest in,  
 9 Brinkmeyer helped finance four of them. It is not clear if Brinkmeyer anticipates ownership in  
 10 all five businesses, just the four he helped finance or some other arrangement. Below are the  
 11 current ownership details of each of the five licenses that Atkison currently has ownership in:

12           a. **CANNA4LIFE.** Atkison owns 80 percent of Canna4Life LLC, a  
 13 marijuana retailer, License Number 414211. Atkison's ownership is through his  
 14 company Insangu, LLC. Insangu, LLC is owned by No. 259, Inc., and No. 259, Inc. is  
 15 owned by Atkison and his spouse. Robin Cook owns the remaining 20 percent of  
 16 Canna4Life. Brinkmeyer, through his company, ATC 2, LLC, loaned \$400,000 to this  
 17 business to help finance Atkison's purchase of the business.

18           b. **317 Retail, LLC.** Atkison owns 50 percent of 317 Retail, LLC, a  
 19 marijuana retailer, License No. 427634. Atkison's ownership is through his company  
 20 Insangu, LLC. Insangu, LLC is owned by No. 259, Inc., and No. 259, Inc. is owned by  
 21 Atkison and his spouse. Brian Jennings and Anthony Peschak each own 25 percent of  
 22 317 Retail, LLC. Brinkmeyer loaned \$800,000 to the business.

23           c. **3213 Retail, Inc.** Atkison owns 50 percent of 3213 Retail, Inc., a  
 24 marijuana retailer, License No. 084154. Atkison's ownership is through his company  
 25 Insangu, LLC. Insangu, LLC is owned by No. 259, Inc., and No. 259, Inc. is owned by

1 Atkison and his spouse. Jennings and Peschek each own 25 percent of this business.  
 2 Brinkmeyer did not provide any financing to this business.

3       d.     **2215 Retail, LLC.** Atkison directly owns 50 percent of 2215 Retail, LLC,  
 4 a marijuana retailer, License No. 423754. Jennings and Peschek each own 25 percent of  
 5 this business. Brinkmeyer, through his company ATC2, LLC, provided \$1,400,000 to  
 6 the business. Atkison also provided a loan of \$800,000 from his personal accounts and  
 7 from his company Insangu, LLC. Additional funds were also provided from 317 Retail,  
 8 and each of the other two owners.

9       e.     **RD Tacoma LLC.** Finally, Atkison and his partners, Brian Jennings and  
 10 Anthony Peschek, acquired a fifth marijuana retail license, RD Tacoma, LLC, License  
 11 No. 415010 on September 10, 2020. Atkison owns 50 percent of RD Tacoma, LLC  
 12 through Insangu, LLC. Jennings and Peschek each own 25 percent of the business.  
 13 A change of location was approved February 10, 2021. The change in location caused  
 14 the license number to change to 358302. Brinkmeyer assisted in financing the change  
 15 of location.

16       7.     Brinkmeyer alleges that there is no reason why he could not hold a Washington  
 17 marijuana license, because the Board has already vetted him. However, whether a person may  
 18 hold a Washington State marijuana license is a decision that the Board determines after fully  
 19 vetting a person at the time they apply. Brinkmeyer was vetted as a financier in October 2020,  
 20 and until he is vetted as an owner, the Board does not know whether he would qualify, absent  
 21 the Residency Requirements. Further, any criminal check done for Brinkmeyer as an out-of-state  
 22 financier would have been insufficient for a marijuana license application. See paragraphs 10,  
 23 17 *infra* for a more detailed explanation. As a result, Brinkmeyer's assertion that he has already  
 24 been vetted for ownership is incorrect.

25       8.     Washington's Residency Requirements are a necessary component of  
 26 Washington's strong and effective regulatory and enforcement systems for its regulated

1 marijuana industry. Residency Requirements help Washington meet the *Cole* memorandum  
 2 guidelines and, as a result, help to prevent federal interference in our market. The federal  
 3 Controlled Substances Act (CSA) makes any marijuana possession, transfer, or delivery a federal  
 4 crime. After I-502 passed, the federal government issued the *Cole* memorandum, which signaled  
 5 the federal government would be unlikely to investigate or prosecute those within the regulated  
 6 marijuana market if certain enforcement priorities were met. Those priorities included  
 7 preventing sales to minors, preventing marijuana from becoming associated with criminal  
 8 affiliates, and preventing diversion of marijuana to other states. The *Cole* memorandum also  
 9 generally expected that states enact “laws authorizing marijuana-related conduct” to “implement  
 10 strong and effective regulatory and enforcement systems that will address the threat those state  
 11 laws could pose to public safety, public health and other law enforcement interests.” It further  
 12 warned, “If state enforcement efforts are not sufficiently robust to protect against the harms . . .  
 13 the federal government may seek to challenge the regulatory structure itself.” Attached as  
 14 **Exhibit 1** is a true and accurate copy of the *Cole* memorandum.

15 9. While the *Cole* memorandum was rescinded by Former Attorney General Jeff  
 16 Sessions, it still serves as the hallmark guidance that states follow, and the federal government  
 17 has continued to implicitly follow that guidance as well. Attached as **Exhibit 2** is a true and  
 18 accurate copy of a recent article entitled “2 years after Sessions Rescinded Cole Memo,  
 19 Prosecutors Continue to Adhere to Obama-Era Enforcement Guidelines.” Upon looking at  
 20 Department of Justice’s prosecutions from 2018-2020, the article concludes that the DOJ still  
 21 follows the *Cole* memorandum despite it being rescinded. Attorney General Merrick Garland  
 22 has not yet reissued the *Cole* memorandum, but has reiterated that the Department of Justice  
 23 should not be using its limited resources to go after people using marijuana in compliance with  
 24 state law.

25 10. Residency Requirements ensure that all potential owners are properly  
 26 investigated and prevent criminal elements from gaining a foothold in Washington’s market.

1 All potential licensees must undergo a financial investigation, a criminal background check, and  
 2 interviews to successfully pass the Board's vetting requirements and be eligible for licensure. In  
 3 order to complete a successful criminal background check, the Board needs to be able to conduct  
 4 criminal background checks in local Washington jurisdictions for crimes and violations that are  
 5 not available in any federal database. The federal database includes only those convictions where  
 6 a person is fingerprinted and not all jurisdictions fingerprint, so it is incomplete. This is  
 7 important, because a pattern of criminal conduct, including just misdemeanors, may disqualify  
 8 an applicant for licensure. *See Wash. Admin. Code § 314-55-040 (2021).* Furthermore, each state  
 9 has a slightly different type of local criminal background system, making it more difficult for  
 10 the Board to determine whom to work with to obtain the necessary information. Conducting such  
 11 in-depth investigation of out of state applicants would both increase the expense of the  
 12 investigation and the time necessary to complete it. Finally, states where marijuana is illegal,  
 13 such as Idaho, could be understandably reluctant to assist another state where it has been  
 14 legalized, particularly when the states share a border.

15       11. Local authorities must be notified of marijuana applications and the associated  
 16 applicants, and can object to the location or the applicants. Wash. Rev. Code § 69.50.331(7)  
 17 (2020). In their objections, local authorities may provide details about an individual that the  
 18 Board may not be aware of, including threats to public safety that may necessitate the denial of  
 19 the applicant for a marijuana license. While it does not happen frequently, I am aware of several  
 20 cases in which information from a local authority prevented individuals from receiving a  
 21 marijuana license. If a marijuana licensee could live out-of-state, local authorities in Washington  
 22 would be unlikely to be able to provide any additional information, and the Board would lose  
 23 this meaningful perspective in evaluating marijuana applicants.

24       12. Our licensing investigations will also be hampered by our inability to receive  
 25 information about a business entity's make up. Not all states have open and easily accessible  
 26 business information. For example, Delaware, Wyoming, New Mexico, and Nevada allow

1 limited liability companies to file without listing the names of the owners, which protects the  
 2 owners' identities. Without being able to fully confirm who is involved, the Board cannot know  
 3 who is actually a true party of interest and whether they qualify to be part of the license.

4       13. The Residency Requirements also support Washington's prohibition on vertical  
 5 integration. Wash. Rev. Code § 69.50.328 (2013). Washington's vertical prohibition means an  
 6 individual or business can only participate on one side of the industry—either, the marijuana  
 7 retailer side, or the marijuana production and processing side. Washington's marijuana system  
 8 was patterned on Washington's alcohol rules, which separate retail sellers from manufacturers  
 9 and distributors to prevent vertical integration. Historically, an alcohol manufacturer's undue  
 10 influence over a retail seller invited criminal activity and unsafe business practices.

11       14. By eliminating the Residency Requirements, Washington's prohibition on  
 12 vertical integration, as set up by the people of Washington, would be undermined. This is because  
 13 another state's resident could be involved with marijuana production, retail, or even both in their  
 14 own state, and then apply to be a producer or retailer in Washington. As there is no federal  
 15 database of those involved in the industry, the best enforcement mechanism we would have is to  
 16 "ask" the individual whether they are involved with marijuana and rely on their truthfulness.  
 17 As demonstrated by some of Atkison's companies, corporate structure can become very  
 18 complicated and make it difficult for the Board to track down whether the individual is in fact  
 19 involved with marijuana outside of Washington. Residency Requirements provide meaningful  
 20 inquiries into applicants' involvement in the marijuana industry within Washington. An influx  
 21 of out-of-state residents, who likely have out-of-state involvement in the marijuana industry,  
 22 would make this inquiry untenable and weaken the Board's ability to enforce the prohibition on  
 23 vertical integration.

24       15. Washington allows one individual/business to own up to five marijuana retailer  
 25 licenses. Wash. Rev. Code § 69.50.325(3)(b) (2020). Such a limitation ensures that big business  
 26 and criminal activity cannot dominate the market in our state—but if Residency Requirements

were eliminated, this safeguard to Washington's marijuana industry would be threatened because it would be difficult to know who is already involved with other retailers in other states. It could allow large interstate companies to form that would dominate not only Washington's market but a national market as well. If the history with Big Tobacco is any indication, the rise of large national cannabis companies will bring negative impact to Washington's market. By keeping all ownership of marijuana businesses in Washington, we can work within our state's regulatory structure to ensure Washington's reasonable limitations on marijuana licenses remain intact.

16. Additionally, Residency Requirements are a necessary component of the state's Social Equity Program the Legislature passed in 2020. The Social Equity Program provides that the remaining 39 licenses that have been returned to the Board may only be issued to a "social equity applicant," which is defined in part as someone who has lived in a disproportionately impacted area. This legislation builds upon the Residency Requirements and seeks to undo harm that the state's marijuana prohibition laws caused to Washington residents. Washington State is not equipped to address the disproportionate effects of marijuana's prohibition laws across this nation, but it is rightfully attempting to address them within our state. Gutting the Residency Requirements would in effect gut this Social Equity Program.

17. While the vetting of financiers and owners is similar, it is not exactly the same. Simply because a person can pass vetting as a financier does not mean that they would pass vetting as an owner. The investigation into an owner is more searching and thorough as compared to a financier. By way of example, Licensing Specialists and Board Enforcement Officers will spend more time reviewing the character of an owner, including local criminal background checks not available for out-of-state financiers. Also, an out-of-state financier is not subject to the same local background scrutiny (because of the difficulty as described in paragraph 11). Another difference is a financier's funds can be more easily traced because they have a one-time determinate amount of money that they are investing. The vetting process for that is straightforward.

1       18. Moreover, owners, and not financiers, are held responsible for the operation of  
 2 the business, regulatory compliance, and for any criminal conduct that may occur. Wash. Admin.  
 3 Code § 314-55-110(4) (2016). Because of the difference in accountability between financiers  
 4 and owners, there is less of a need for financiers to be domiciled in the state. In contrast, an  
 5 owner must be located here so they can oversee business operations, timely respond to  
 6 investigations, be present for inspections as needed, and properly respond to the Board's requests  
 7 for documents or information. *See* Wash. Admin. Code § 314-55-185 (2018).

8       19. The Board determined that the six-month residency requirement is the shortest  
 9 amount of time to accomplish the goals discussed *supra*. When I-502 was initially passed, the  
 10 Residency Requirements were only a three-month period. While we would have liked to make  
 11 that work, the Board had issues with individuals who came into Washington for three months  
 12 for the sole purpose of receiving a marijuana license and then would return to their home state.  
 13 This caused issues on the Licensing side as well as on the Enforcement side, as applications often  
 14 take three months or more to process, so applicants would start out qualifying for a license, but  
 15 by the end would not, because they were no longer a resident. To that end, Second Engrossed  
 16 Second Substitute House Bill 2136 in 2015 was passed and raised the Residency Requirements  
 17 from three months to six months. This small increase has better achieved the purposes of the  
 18 Residency Requirements set forth in this Declaration.

19       20. If marijuana becomes federally legal, it may be time for another discussion  
 20 regarding the Residency Requirements. In a recent article, cannabis policy experts discussed  
 21 proposed federal legislation to legalize marijuana. Although the experts support it, they raised  
 22 concerns about the federal government creating an interstate cannabis market overnight. They  
 23 warn that the sudden application of the dormant Commerce Clause would remove requirements  
 24 such as residency requirements, social equity programs, and track-and-trace systems. They also  
 25 warn that removal of these policies would inhibit state regulators' abilities to prevent diversion.

26       ///

1 Attached as **Exhibit 3** is true and accurate copy of a recent article entitled, “Commerce Clause  
 2 ‘Chaos’ Could Follow Fed. Pot Legalization.”

3       21. I also understand that other states have chosen not to include residency  
 4 requirements in their marijuana system. While that may work for them, other states have issues  
 5 with overproduction and diversion of marijuana out of state. For example, Oregon does not have  
 6 a residency requirement and it has significant overproduction. Overproduction of marijuana is a  
 7 common issue that leads to diversion, as marijuana licensees may become desperate to make a  
 8 sale in an over saturated market, so they end up selling their marijuana out of state to earn money  
 9 to keep their business afloat. As explained by a recent article, “Residency Requirements for  
 10 Marijuana License,” on page 9, the elimination of the residency requirement may have caused  
 11 Oregon to be the “target of federal attention due to marijuana diversion.” That article on page 4  
 12 also states that “[t]he main cost of residency requirements is a loss of funding.” That concern is  
 13 not as great in Washington anymore, because as previously discussed, we have allowed out-of-  
 14 state financiers to provide money and loans to marijuana retailers. A true and accurate copy of  
 15 that article is attached as **Exhibit 4**.

16       22. I am proud to say that Washington’s marijuana regulations have ensured that  
 17 70 percent of marijuana in Washington right now has come from legal sources, displacing the  
 18 illegal market. While that number may seem low, it is one of the highest in the nation for legal  
 19 marijuana production.

20       23. Some states, including Brinkmeyer’s residence, Idaho, have not chosen to  
 21 decriminalize marijuana. Attached as **Exhibit 5** is a true and accurate copy of an explanation of  
 22 laws and map detailing the current legality of marijuana in each state.

23       ///

24       ///

25       ///

26

1           24. In my opinion as Licensing Director for the last nine years, and a dedicated  
2 advocate for the integrity of Washington's marijuana industry, it is paramount that the Residency  
3 Requirements be maintained.

4 Pursuant to 18 U.S.C. § 1746 (1976), I declare under penalty of perjury that the  
5 foregoing is true and correct.

6 ||| Signed this 28 day of January 2022, at Olympia, Washington.

Rebecca Smith  
REBECCA SMITH  
Licensing Director  
Washington State Liquor and Cannabis Board